



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8  
999 18<sup>TH</sup> STREET - SUITE 300  
DENVER, CO 80202-2466  
<http://www.epa.gov/region08>

July 11, 2003

Ref: 8ENF-T

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

The Corporation Company  
Registered Agent for The Mills Corp.  
1675 Broadway  
Denver, CO 80202

Administrative

Re: Notice of Proposed Assessment of  
Civil Penalty, Docket No. **CWA-08-2003-0077**  
Facility Permit No. COR-033217

Dear Agent for Service of Process:

Enclosed is a document entitled Penalty Complaint and Notice of Opportunity for Hearing (Complaint"). The United States Environmental Protection Agency ("EPA") is issuing this Complaint against The Mills Corp. pursuant to section 309 of the Clean Water Act ("Act"), 33 U.S.C. § 1319. In the Complaint, EPA alleges that The Mills Corp. has violated section 301(a) of the Act, 33 U.S.C. § 1311(a), and the storm water requirements specified in Colorado Discharge Permit System ("CDPS") permit no. COR-030000. The Complaint proposes that a penalty of \$115,000 be assessed against The Mills Corp. for these violations.

You have the right to a hearing to contest the factual allegations in the Complaint or the appropriateness of the proposed penalty. We have enclosed a copy of 40 C.F.R. part 22, which identifies the procedures EPA follows in administrative civil penalty assessments.

**If you wish to contest the allegations in the Complaint or the penalty proposed in the Complaint, you must file an answer within thirty (30) days of your receipt of the enclosed Complaint to the EPA Region VIII Hearing Clerk at the following address:**

Regional Hearing Clerk (8RC)  
U.S. EPA, Region VIII  
999 18th Street, Suite 300  
Denver, Colorado 80202-2466

If you do not file an answer within thirty (30) days [see 40 C.F.R. § 22.15(d)], you may be found in default. A default judgment may impose the full penalty proposed in the Complaint (\$115,000).



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EPA encourages the consideration of Supplemental Environmental Projects (SEPs) in conjunction with civil penalties, in the settlement of civil enforcement cases. In case you are interested in this possibility, we have enclosed a copy of the EPA policy that describes the possibilities and limitations of SEPs in such matters. An agreement to perform a SEP may result in a lower cash penalty amount.

EPA encourages settlement of these proceedings at any time prior to a formal hearing if the settlement is consistent with the provisions and objectives of the Act and applicable regulations (See 40 C.F.R. § 22.18). If a mutually satisfactory settlement can be reached, it will be formalized in a consent agreement signed by you and the delegated authority for EPA. Upon final approval of the consent agreement by the Regional Judicial Officer, The Mills Corp. will be bound by the terms of the consent agreement and will waive its right to a hearing on, and judicial appeal of, the agreed upon civil penalty. You have the right to be represented by an attorney at any stage of the proceedings, including any informal discussions with EPA.

A Small Business Regulatory Enforcement and Fairness Act (SBREFA) information sheet, containing information on compliance assistance resources and tools available to small businesses, is enclosed with this letter. SBREFA does not eliminate your responsibility to comply with the Act and respond to this Complaint, nor does it create any new rights or defenses under law.

If you have any questions regarding this letter, the enclosed Complaint, or any other matters pertinent to The Mills Corp.'s compliance with the Act, the most knowledgeable people on my staff regarding these matters are Colleen Gillespie, Technical Enforcement, at (303) 312-6047 or David J. Janik, Supervisory Enforcement Attorney, at (303) 312-6917. If you are represented by an attorney, or to request a settlement conference, please call Mr. Janik. Please note that arranging for a settlement meeting does not relieve you of the need to file a timely answer to EPA's Complaint.

Sincerely,

**SIGNED**

Carol Rushin  
Assistant Regional Administrator  
Office of Enforcement, Compliance  
and Environmental Justice

Enclosures:

1. Penalty Complaint and Notice of Opportunity for Hearing
2. Consolidated Rules of Practice (40 C.F.R. Part 22)
3. Supplemental Environmental Projects Policy
4. Small Business Regulatory Enforcement and Fairness Act information
5. Memo from CDPHE

cc: Tina Artemis, Regional Hearing Clerk  
Mark Pifher, CDPHE

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
REGION 8  
Docket No. CWA-08-2003-0077**

In the Matter of:

The Mills Corporation,  
a Delaware corporation  
DBA Colorado Mills, LLC

Respondent.

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)  
)  
)  
)  
)

**PENALTY COMPLAINT AND NOTICE OF  
OPPORTUNITY FOR HEARING**

**INTRODUCTION**

1. This civil administrative enforcement action is authorized by Congress in section 309(g) of the Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA or the Act). 33 U.S.C. § 1319(g). The Environmental Protection Agency (EPA) regulations authorized by the statute are set out in part 122 of title 40 of the Code of Federal Regulations (C.F.R.), and violations of the statute, permits or EPA regulations constitute violations of that section of the Act. The rules for this proceeding are the “Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits (“Rules of Practice”),” 40 C.F.R. part 22, a copy of which is enclosed.

2. The undersigned EPA official has been properly delegated the authority to issue this action. EPA has consulted with the State as required by the Act. 33 U.S.C. § 1319(g)(1).

3. EPA alleges that Respondent has violated the Act, permit and/or regulations and proposes the assessment of a civil penalty, as more fully explained below.

**NOTICE OF OPPORTUNITY FOR A HEARING**

4. Respondent has the right to a public hearing before an administrative law judge to disagree with (1) any fact stated (alleged) by EPA in the complaint, (2) the grounds for any legal defense or (3) the appropriateness of the proposed penalty.

5. To disagree with the complaint and assert your right to a hearing, Respondent must file a written answer (and one copy) with the Regional Hearing Clerk (999 18<sup>th</sup> Street; Suite 300 (8RC); Denver, Colorado 80202) within 30 days of receiving this complaint. The answer must clearly admit, deny or explain the factual allegations of the complaint, the grounds for any defense, the facts you may dispute, and your specific request for a public hearing. Please see section 22.15 of the Rules of Practice for a complete description of what must be in the answer. **FAILURE TO FILE AN ANSWER AND REQUEST FOR HEARING WITHIN 30 DAYS MAY WAIVE**

**RESPONDENT'S RIGHT TO DISAGREE WITH THE ALLEGATIONS OR PROPOSED PENALTY, AND RESULT IN A DEFAULT JUDGMENT AND ASSESSMENT OF THE PENALTY PROPOSED IN THE COMPLAINT, OR UP TO THE MAXIMUM AUTHORIZED BY THE ACT.**

**QUICK RESOLUTION**

6. Respondent may resolve this proceeding at any time by paying the penalty amount proposed in the complaint. Such payment need not contain any response to, or admission of, the allegations in the complaint. Such payment constitutes a waiver of Respondent's right to contest the allegations and to appeal the final order. See section 22.18 of the Rules of Practice for a full explanation of the quick resolution process.

**SETTLEMENT NEGOTIATIONS**

7. EPA encourages discussing whether cases can be settled through informal settlement conferences. If you want to pursue the possibility of settling this matter, or have any other questions, contact David J. Janik, Supervisory Enforcement Attorney, at [1-800-227-8917 ; extension 6917 or 303-312-6917] or the address below. **Please note that calling the attorney or requesting a settlement conference does NOT delay the running of the 30 day period for filing an answer and requesting a hearing.**

**GENERAL ALLEGATIONS**

The following general allegations apply to all times relevant to this action, and to each count of this complaint:

8. In order to restore and maintain the integrity of the nation's water, section 301(a) of the Act prohibits the discharge of pollutants into navigable waters of the United States, unless it is in compliance with a permit issued pursuant to the Act. 33 U.S.C. § 1311(a).

9. Section 402 of the Act establishes a National Pollutant Discharge Elimination System (NPDES) program, administered by EPA or State, to permit discharges into navigable waters, subject to specific terms and conditions. 33 U.S.C. § 1342.

10. The Act requires that a discharge of storm water associated with an industrial activity to navigable waters must comply with the requirements of an NPDES permit. 33 U.S.C. § 1342(p).

11. The Act authorized, and EPA issued, regulations that further define requirements for NPDES permits for storm water discharges. 33 U.S.C. § 1318, § 1342(p). The regulations are found at 40 C.F.R. part 122.

1 12. EPA regulations define discharges associated with industrial activity to include  
2 construction activity. 40 C.F.R. § 122.26(b)(14)(x)  
3

4 13. EPA regulations require each person who discharges storm water associated with  
5 industrial activity to either apply for an individual permit or seek coverage under an existing and  
6 lawful general permit. 40 C.F.R. § 122.26(c).  
7

8  
9 14. The State of Colorado has lawfully issued a general permit, under the authority of State  
10 law and the Act, which authorizes the discharge of storm water associated with construction  
11 activities, if done in compliance with the conditions of the permit. Colorado issued certification  
12 no. COR-033217 on April 10, 2000 which provided storm water permit coverage under permit no.  
13 COR-030000. Colorado permit no. COR-030000; attached as exhibit A (“permit”).  
14

15 15. The permit requires, among other things, that a person discharging pollutants develop  
16 and implement an adequate storm water management plan (SWMP), conduct regular specified  
17 storm water inspections, and implement best management practices (“BMPs”), etc. BMPs include  
18 structural controls (such as sediment ponds and silt fences) and management practices (such as a  
19 dedicated concrete washout area and street sweeping).  
20

21 16. Respondent is a corporation, incorporated in the State of Delaware, and doing business  
22 in the State of Colorado.  
23

24 17. Respondent is a “person” within the meaning of section 502(5) of the Act, and  
25 therefore subject to the requirements of the statute and/or regulations. 33 U.S.C. § 1362(5).  
26

27 18. Respondent owned or was engaged in construction activities at a facility located at  
28 14500 Colfax Ave in Lakewood, CO, (“facility”).  
29

30 19. Respondent engaged in construction activities at the facility at all times relevant to this  
31 action.  
32

33 20 Respondent is therefore engaged in an “industrial activity” as defined by EPA  
34 regulations. 40 C.F.R. § 122.26(b)(14).  
35

36 21. Storm water, snow melt, surface drainage and run off water leaves Respondent’s  
37 facility and goes into Lena Gulch.  
38

39 22. The run off and drainage from Respondent’s facility is “storm water” as defined by  
40 EPA regulations. 40 C.F.R. § 122.26(b)(13).  
41

42 23. Storm water contains “pollutants” as defined by the Act. 33 U.S.C. § 1362(6).  
43

44 24. Lena Gulch is a tributary of Clear Creek, which is a tributary of the S. Platte River.  
45 Lena Gulch, Clear Creek, and the S. Platte River are “navigable waters” and “waters of the United  
46 States,” as defined by the Act and EPA regulations, respectively. 33 U.S.C. § 1362(7); 40 C.F.R. §

1 122.2.

2  
3 25. Respondent's storm water runoff is the "discharge of a pollutant" as defined by EPA  
4 regulations. 40 C.F.R. § 122.(b)(14)(x).

5  
6 26. An authorized employee of the State of Colorado entered the facility on April 9, 2002  
7 to inspect it for compliance with the permit and regulations. The counts below outline violations  
8 confirmed by the inspector.

9  
10 27. An authorized EPA employee entered the facility with the consent of Respondent on  
11 June 4, 2002 to inspect it for compliance with the statute, permit and regulations. The counts  
12 below outline violations confirmed by the inspector.

13  
14 28. An authorized EPA employee conducted a reconnaissance inspection at the facility on  
15 October 3, 2002 to inspect it for compliance with the statute, permit and regulations. The counts  
16 below outline violations confirmed by the inspector.

17  
18 29. Construction activities disturbing over five acres commenced at the facility in April  
19 2001.

20  
21 30. Section 301 of the Act and the storm water regulations at 40 C.F.R. § 122.26 require  
22 that a stormwater permit be obtained for construction activity including clearing, grading and  
23 excavation disturbing at least five acres. Respondent is covered under the permit and subject to its  
24 terms and conditions.

25  
26 **COUNT 1**

27  
28 31. Respondent failed to conduct inspections as required by the permit. At the time of  
29 EPA's June 4, 2002 inspection, stormwater inspections had not been performed after every  
30 precipitation event that could cause erosion and Respondent had no documentation that the  
31 inspections had been performed. On at least the following dates Respondent violated its permit by  
32 failing to perform inspections after precipitation events that could cause surface erosion : 5/2/01,  
33 5/3/01, 5/14/01, 5/16/01, 5/17/01, 5/20/01, 5/29/01, 5/30/01, 6/13/01, 6/21/01, 7/10/01, 7/31/01,  
34 8/2/01, 8/9/01, 8/13/01, 8/14/01, 9/8/01, 9/17/01, 11/8/01, 11/18/01, 1/4/02, 1/23/02, 2/25/02,  
35 3/8/02, 3/14/02, 5/24/02, and 6/2/02.

36  
37 32. Respondent's failure to conduct inspections as required by the permit constitutes  
38 violations of the Act. 33 U.S.C. § 1319, § 1342(p).

39  
40  
41 **COUNT 2**

42  
43 33. The State of Colorado's April 9, 2002 inspection found that the SWMP did not reflect  
44 current field conditions. Information provided by Respondent in response to EPA's inspection  
45 found that the SWMP did not contain the following required components: a site description, a  
46 description of BMPs which clearly describes in what construction phase each BMP will be

implemented, and information on final stabilization and stormwater management.

34. Respondent's failure to develop a complete SWMP as required by the permit constitutes violations of the Act. 33 U.S.C. § 1319, § 1342(p).

### COUNT 3

35. Respondent's permit requires Respondent to maintain a copy of the SWMP at the construction site. During EPA's June 4, 2002 inspection, the SWMP was not available on site.

36. On at least June 4, 2002, Respondent violated its stormwater permit by failing to maintain a copy of the SWMP on site which constitutes a violation of the Act. 33 U.S.C. § 1319, § 1342(p).

### COUNT 4

37. The permit requires Respondent to implement best management practices (BMPs) in order to minimize the impact of Respondent's construction activities on waters of the United States. At the time of EPA's June 4, 2002 inspection there was inadequate fuel containment around fuel storage areas. EPA's October 3, 2002 reconnaissance inspection found inadequately maintained BMPs along Colfax Avenue to control sediment. An inspection by the State of Colorado on April 9, 2002 also found inadequately maintained BMPs to control sediment runoff from exposed area along Colfax.

38. Respondent's failure to implement BMPs as required by the permit constitutes violations of the Act. 33 U.S.C. § 1319, § 1342(p).

### COUNT 5

39. The permit requires Respondent to implement best management practices (BMPs) in order to minimize the impact of Respondent's construction activities on waters of the United States. At the time of EPA's June 4, 2002 inspection no vehicle track pad was in place along the main entry area. EPA's reconnaissance inspection on October 3, 2002 found no BMPs to control sediment runoff from an exposed area along Hawthorn.

40. Respondent's failure to implement BMPs as required by the permit constitutes violations of the Act. 33 U.S.C. § 1319, § 1342(p).

### PROPOSED CIVIL PENALTY

41. The Act authorizes the assessment of a civil penalty of up to \$27, 500 per day, for each violation of the Act. 33 U.S.C. § 1319(g). The Act requires EPA to take into account the

1 following factors in assessing a civil penalty: the nature, circumstances, extent and gravity of the  
2 violation; Respondent's prior compliance history of such violations; Respondent's culpability for  
3 the violation; any economic benefit or savings gained from the violation; and other factors that  
4 justice may require.

5  
6 42. In light of the statutory factors and the specific facts of this case, EPA proposes that a  
7 penalty of \$115,000 be assessed against Respondent for the violations alleged above, as explained  
8 below:

9  
10 Nature, Circumstances, Extent, and Gravity of Violations

11  
12 Construction began at the facility in April 2001. The April 9, 2002 inspection by the State  
13 of Colorado found that the SWMP did not reflect current site conditions. The June 4, 2002  
14 EPA inspection and Respondent's response to the inspection revealed the following  
15 components are missing from the SWMP: a site description, a description of BMPs which  
16 clearly describes in what construction phase each BMP will be implemented, and  
17 information on final stabilization and stormwater management. At EPA's June 4, 2002  
18 inspection, the SWMP was not on site. The EPA and State inspections revealed the  
19 following BMPs were not in place or were not being implemented: vehicle track out pads,  
20 BMPs to control sediment runoff from an exposed area along Hawthorn, a BMP to contain  
21 fuel spills, and adequately maintained BMPs to control sediment along Colfax Avenue.

22  
23 Prior Compliance History

24  
25 This Complaint is the first enforcement action EPA Region 8 has issued to Respondent  
26 requiring compliance with the applicable stormwater regulations.

27  
28 Degree of Culpability

29  
30 Respondent had a copy of the stormwater permit, and should have been aware of all the  
31 requirements therein.

32  
33 Economic Benefit

34  
35 An economic benefit was experienced by Respondent for failure to comply with the  
36 stormwater permit. Specifically, Respondent benefitted by not spending the required funds  
37 to perform inspections after precipitation events on the dates listed in paragraph 29.  
38 Respondent also failed to spend the funds to install a vehicle track out pad and adequate  
39 fuel containment by June 4, 2002. Respondent failed to spend the funds to install BMPs  
40 along Hawthorne and to adequately maintain BMPs to control sediment along Colfax  
41 Avenue by October 10, 2002. Respondent failed to prepare an adequate SWMP by April  
42 2001.

43  
44 Ability to Pay

45  
46 **EPA did not reduce the proposed penalty due to this factor, but will consider any new**



**information Respondent may present regarding Respondent's ability to pay the penalty proposed in this Complaint.**

Other Matters that Justice may Require

No adjustments made regarding these factors at this time.

43. As required by the Act, prior to the assessment of a civil penalty, EPA will provide public notice of the proposed penalty, and reasonable opportunity for the public to comment on the matter, and present evidence in the event a hearing is held. 33 U.S.C. § 1319(g)(4).

44. The ALJ is not bound by EPA's penalty policy or the penalty proposed by EPA, and may assess a penalty above the proposed amount, up to the \$27,500 per day per violation authorized in the statute.

To discuss settlement or ask any questions you may have about this case or process, please contact David J. Janik, Supervisory Enforcement Attorney, at 303-312-6917, or the address below.

United States Environmental Protection Agency  
Region 8, Office of Enforcement, Compliance and  
Environmental Justice, Complainant  
999 18<sup>th</sup> Street, Suite 300 (ENF-L)  
Denver, CO 80202

Date: 7/9/03

By: **SIGNED**  
Carol Rushin  
Assistant Regional Administrator

**SIGNED**  
David J. Janik, Supervisory Enforcement Attorney  
Legal Enforcement Program

**IF YOU WOULD LIKE COPIES OF THE ATTACHMENTS, PLEASE CONTACT THE REGIONAL HEARING CLERK**

**THIS DOCUMENT WAS FILED IN THE RHC'S OFFICE ON JULY 11, 2003.**